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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WAITE,

Defendant.

**MOTION FOR JURY
INSTRUCTION OR, AS
ALTERNATIVES, TO DISMISS THE
INDICTMENT OR DECLARE
STATUTE UNCONSTITUTIONAL**

Case No. 2:09 CR 00290 DAK

Judge Dale A. Kimball

Defendant, David Waite, by and through counsel of record, HENRI SISNEROS, requests this court to approve a jury instruction that clarifies an element of the offense for selling or seeking to sell an “archaeological resource” as proscribed under 16 U.S.C. § 470ee. Specifically, that statute requires a knowing mens rea. In the context of this case, this mental state requires the government to prove that persons charged under the statute knew that the objects to be sold were, in fact, illegally obtained under § 470ee. Otherwise, anyone who simply possesses or even contacts a protected artifact would be guilty of a crime even if they have no idea the object is protected.

Absent a jury instruction, the Indictment and prosecution are unconstitutional. Criminal defendants have a right to be charged only after a grand jury hears evidence that supports each element of a crime. Here, this court must dismiss the Indictment because it fails to identify the required knowledge a person must possess to violate § 470ee. In fact, the government appears to have operated under the false assumption before the grand jury that the knowing mens rea under § 470ee did not require the government to present any evidence that Mr. Waite knew that the artifacts were protected archaeological resources. Moreover, if the government's view of the knowledge requirement is correct, § 470ee is unconstitutional because it criminalizes innocent conduct. Given the denial of the rights to an indictment by a grand jury and the inclusion of innocent persons under the government's approach, Mr. Waite's constitutional rights require the dismissal of the Indictment.

DATED this 28th day of May, 2010.

/s/ Henri Sisneros
HENRI SISNEROS
Assistant Federal Defender

CERTIFICATE OF DELIVERY

I hereby certify that on May 28, 2010, I electronically filed the foregoing **Motion for Jury Instruction or, as Alternatives, to Dismiss the Indictment or Declare Statute Unconstitutional** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Carlie Christensen
Acting United States Attorney

Richard D. McKelvie
Assistant United States Attorney

Cy H. Castle
Assistant United States Attorney

/s/ Kristine Harris_____